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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955.

No. 215 .

JAMES LOWE,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statute Involved | 2 |
| Statement | 2 |
| Reasons for Granting the Writ | 5 |
| Conclusion | 9 |
| Opinion of the United States Court of Appeals for the Third Circuit | 11 |

## Citations.


| | PAGE |
|---|---|
| *Cohen* vs. *United States*, 56 F. 2d 28 (1st Cir. 1932) | 7 |
| *Coulston* vs. *United States*, 51 F. 2d 178 (10th Cir. 1931) | 7 |
| *Fielding* vs. *United States*, 164 F. 2d 1022 (C. A. 6, 1947) | 8 |
| *Gideon* vs. *United States*, 52 Fed. (2) 427 | 7 |
| *Morton* vs. *United States*, 147 F. 2d 28, 31 (C. A. D. C. 1945), cert. denied 324 U. S. 875 (1945) | 8 |
| *Newman* vs. *United States*, 289 F. 712 (4th Cir. 1923) | 7 |
| *United States* vs. *Klass*, 166 F. (2) 373 (3rd Cir.) | 7 |
| *United States* vs. *Sager*, 49 F. 2d 725 (2nd Cir. 1931) | 7 |
| *Smith* vs. *United States*, 10 F. 2d 787 (9th Cir. 1926) | 7 |
| *Zammar* vs. *United States*, 217 F. 2d 223, 226 (C. A. 8, 1954) | 8 |


## Statutes.


| | |
|---|---|
| 18 U. S. C., Sec. 1951 | 1, 2 |
| 28 U. S. C., Sec. 1254(1) | 1 |


## Other Authority.


| | |
|---|---|
| 2 Wigmore, Evidence, § 285 (3 ed. 1940) | 8 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

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JAMES LOWE,
Petitioner.

*vs.*

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner James Lowe prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 14, 1956, which affirmed his conviction for violation of 18 U. S. C., sec. 1951.

## Opinions Below.

The district court did not file an opinion. The opinion of the Court of Appeals, printed *infra*, pp. 11-16, has not yet been officially reported.

## Jurisdiction.

The judgment of the Court of Appeals was entered on June 14, 1956 (280a). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

## Questions Presented.

1. Whether prejudicial error is committed and a fair trial is denied to a defendant when under the guise of cross-examination and in summation the commission of a similar offense by the defendant is suggested.

2. Whether the defendant's failure to call as a witness in an earlier trial a person who was deceased at the time of the instant trial, may be shown and commented upon adversely to the defendant.

## Statute Involved.

Petitioner was indicted, convicted, and sentenced under the Hobbs Act, 18 U. S. C., § 1951. The questions presented in this petition do not involve the statute.

## Statement.

1. Petitioner was indicted with one Madden for obstructing interstate commerce by extortion and attempted extortion (59a).* They were charged with demanding $20,000 and actually receiving $12,000 from one Gragg, who was constructing a pipe line, to insure the job would not be jeopardized by labor trouble. On the trial of that indictment the jury disagreed (165a). Petitioner was thereafter indicted for the same offense. Madden was not named in this indictment but included as a defendant was William Payne, an employee and stockholder of a lumber company.

* The references are to the appendix in the court below.

who was charged with aiding petitioner by causing the company to issue false invoices to Gragg, pursuant to which he paid the sum of $12,000 (5a-9a). Payne died before trial (1a). Petitioner was then tried and convicted on both counts and sentenced to three years and to pay a fine of $10,000 (3a).

Petitioner testified that in 1952, the year of the alleged offenses, he was an officer of several labor organizations to neither of which position was there a salary attached; and that he was also business agent for an ironworkers local for which he received a salary (164a, 165a). He lived with his wife on one floor of a 2½ family house, the other floors being rented out (163a, 166a).

During cross-examination he was asked questions over objection, which elicited testimony that in 1951 he received $29,000 as a commission from a contractor. The receipt of the $29,000 was emphasized when on cross-examination a character witness was asked whether he knew that petitioner had received this sum from a contractor on a construction job (222a). In rebuttal, over objection, the Government introduced petitioner's income tax returns for the years 1951 and 1952 (Exhibits G-12, G-13, R263a, 264a) which not only showed the $29,000 received in 1951 but the sum of $3,973.00 also received from a company in 1952. Finally, in his summation, the assistant district attorney characterized the petitioner as "one of the biggest racketeers—as this very evidence indicates * * *" (227a). Through cross-examination and the tax returns it was also shown that in 1951 and 1952 the petitioner profited through the purchase and sale of large amounts of shares of stock.

The Court below held that the cross-examination was proper because (a) the petitioner had opened up the subject of his financial standing and (b) it was material in testing his credibility (p. 13, *infra*). The introduction of the income tax returns was sanctioned for the same reasons.

2. Payne was dead when this trial began (1a). He had been present in court at times during the earlier trial (207a). During cross-examination of the petitioner the prosecutor asked questions, over objection, which elicited testimony that Payne had not testified for Lowe in the earlier trial (207a, 208a).

In his summation, the prosecutor then commented as follows upon Payne's failure to testify (226a, 227a):

> "Now, ladies and gentlemen, this William Payne that you have been hearing about is dead. But he was very, very much alive during the last trial. He was very much alive when he was in this courtroom during the last trial.
>
> "Mr. Hood: Your Honor, I do not like to interrupt counsel's summation, but I think this is improper.
>
> "The Court: It is in the record. I think the inferences to that are proper. I will allow it and allow you an exception.
>
> "Mr. Garven: (Continuing) And I asked Mr. Lowe today: 'Did your own nephew Payne testify on your behalf in the last trial?' and what was his answer? 'No. My lawyer can answer why,' or words to that effect.
>
> "Ladies and gentlemen, the defendant's own nephew did not take the stand on behalf of this James Lowe the last time when he was available in the courtroom.

"Mr. Hood: For the record, your Honor, at this point I am going to make a motion for a mistrial.

"The Court: The motion will be denied.

"Mr. Hood: An exception is noted, sir."

The Court below did not decide that the admission of this testimony was not error. It merely said that the matter was not an important element in the trial and therefore could not be a ground for reversal (*infra*, p. 16).

## Reasons for Granting the Writ.

*As to Question 1.*

The Court below has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals by permitting evidence, the tendency of which was to prejudice the petitioner in the eyes of the jury, to the end that a fair trial was denied to the petitioner.

The case was a close one. The outcome depended on whether the jury believed Gragg or the petitioner. As the Court below said, the jury had to decide between the categorical assertions on one side and the equally categorical denials on the other (*infra*, p. 16). Yet thrown into the balance against the petitioner was evidence which suggested that he had extorted or otherwise improperly obtained from a contractor a large sum of money on another occasion.

Neither in the opening statement of his attorney nor in the petitioner's direct examination was the subject of petitioner's income adverted to, except with respect to his salary from a local union. The cross-examination did not

develop any evidence contradictory of the opening statement or of the direct examination. The cross-examination which produced the evidence of a large payment by a contractor in 1951 in nowise tended to test the petitioner's credibility.

Government counsel knew from the tax returns in his hands of the payment to the petitioner in 1951. He also knew that it came from a construction job. His questions were not inadvertent. They were designed to produce the evidence for consideration by the jury against the petitioner. This evidence suggested the commission by the petitioner of a similar offense. By asking a character witness whether he knew of this payment, Government counsel insinuated that the money had been wrongfully or improperly acquired. And by arguing in his summation that the evidence in the case indicated that the petitioner was "one of the biggest racketeers" Government counsel undoubtedly relied in part on the $29,000 payment. Such an assertion could not be predicated on the single offense charged in the indictment.

From the evidence and its use the jury might well surmise that the 1951 money was extorted by the petitioner and thus be led to a conclusion that he was guilty in this case. The tax returns, admitted in evidence in rebuttal, afforded to the jury a written memorial of the evidence as well as proof that the petitioner had received and reported income of $3,973 from a company, the reason for the receipt being neither disclosed nor explained. This item too could give rise to unfavorable inferences and speculation by the jury.

The ruling of the Court below is contrary to the holding in *Gideon* vs. *United States*, 52 Fed. (2) 427, where the Eighth Circuit said on page 430:

> " • • • It is not permissible under the guise of testing the credibility of a defendant to question him on cross examination about matters not touched upon in the examination in chief nor pertinent thereto; not tending to prove the charge upon which the defendant is being tried, but the sole tendency of which is to prejudice the defendant in the eyes of the jury."

The ruling is also in conflict with the decisions of many Circuit Courts of Appeals which hold that evidence of other similar offenses is generally not admissable. *See United States* vs. *Klass*, 166 F. (2) 373 (3rd Cir.); *Neaman* vs. *United States*, 289 F. 712 (4th Cir. 1923); *United States* vs. *Sager*, 49 F. 2d 725 (2nd Cir. 1931); *Smith* vs. *United States*, 10 F. 2d 787 (9th Cir. 1926); *Cohen* vs. *United States*, 56 F. 2d 28 (1st Cir. 1932); *Coulston* vs. *United States*, 51 F. 2d 178 (10th Cir. 1931). Even in those cases where such evidence is admissible, it is not allowed without proof of the actual commission of the offense. *A fortiori*, proof which falls short of this standard must not and should not have been allowed for consideration by a jury which was then free to view it suspiciously against the defendant. (*Klass* case, *supra*).

*As to Question 2.*

The Court of Appeals has sanctioned a new rule of evidence. It is a departure from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

There is no precedent for this decision.

The question arises from the fact that the petitioner was asked whether Payne had testified for him at an earlier trial. And in summation Government counsel commented on his failure to call Payne at *that earlier trial*. Payne had died before the second trial.

There are several reasons why this Court should invalidate the new rule sanctioned by the Court of Appeals:

(1) The rule concerning the failure to call a witness who might have relevant information is that it is evidence from which the jury may reasonably infer that the defendant is afraid of exposing unfavorable facts. 2 Wigmore, Evidence, § 285 (3 ed. 1940). But the new rule permits the jury to draw an unreasonable inference, for it stems from the defendant's conduct of an earlier trial in which both he and the prosecutor had a right to sift and select evidence and witnesses to accomplish many objectives including conserving trial time and enhancing the understanding of the jury. Cf. *Zammar* v. *United States*, 217 F. 2d 223, 226 (C. A. 8, 1954); *Fielding* v. *United States*, 164 F. 2d 1022 (C. A. 6, 1947); *Morton* v. *United States*, 147 F. 2d 28, 31 (C. A. D. C. 1945), cert. denied 324 U. S. 875 (1945).

Since the evidence in and the imponderables involved in the conduct of an earlier trial are not before the jury in a second trial, no inference can be reliable and therefore should not be permitted. The jury did not know what evidence, if any, had been offered as to Payne at the earlier trial. They had no right to assume that the evidence at the second trial was the same as that at the first trial. Yet they were permitted to draw this inference and

from this to infer that Payne was not called because he could not aid the petitioner.

(2) The jury were asked to decide an alien fact, namely, whether Payne should have been called at the first trial. They did not know the state of the evidence at that trial. They were therefore not in a position to evaluate the petitioner's failure to call Payne. The evidence regarding this and the comment thereon in summation allowed the jury to condemn the petitioner on the basis of incomplete knowledge of the facts.

This Court should exercise its power of supervision and hear and consider the case on the merits. The conduct complained of was erroneous and prejudicial to the petitioner.

If the new rule of evidence sanctioned by the court of Appeals remains in effect, it also means that juries in other cases may likewise decide cases on the basis of incomplete evidence and misleading inferences.

## Conclusion.

It is respectfully submitted that the questions raised are of such importance in the administration of the criminal law that there should be an authoritative determination of the same by this Court. Accordingly, the petitioner asks that this Court issue a writ to review the judgment below.

Respectfully submitted,

Anthony A. Calandra,
Attorney for Petitioner.

Max Mehler,
Attorney for Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 11,789

UNITED STATES OF AMERICA,

*v.*

JAMES LOWE,

*Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued May 10, 1956

Before MAHS, GOODRICH and KALODNER, *Circuit Judges.*

## Opinion of the Court.

(Filed June 14, 1956.)

By GOODRICH, *Circuit Judge.*

The defendant appeals from a judgment of conviction in a prosecution brought under the Hobbs Act, 18 U. S. C. § 1951 (1952).[1] It is not claimed that there is not sufficient

[1] "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

evidence to sustain the conviction. But it is claimed that there were errors at the trial of such nature that the accused is entitled to a new trial. While the appellant presents five questions in his list of alleged grounds for reversal, it will be convenient, in discussing the case, to combine some of them.

The appellant devotes a great deal of argument to the fact that the United States Attorney was permitted to question the defendant when he took the stand concerning his sources of income for the years 1951 and 1952. He makes the argument that the court thus permitted cross examination to go beyond the scope of the direct examination and, under the federal rule, this was erroneous and a basis for reversal. We do not stop to comment upon the desirability of the alleged restriction in the federal rule except to note that it has been criticized by writers of eminence in the field.[2] Our point here is that in this case the rule was inapplicable.

The question of the defendant's financial standing was not introduced into the case by the government but by the defendant himself. The principal witness for the prosecution, a man named C. Hubert Gragg, was alleged to have paid the money secured by extortion. It was brought out in cross examination that Gragg's part in the performance of the contract for building a pipe line was one that was highly profitable to him. When the defense opened, defendant's counsel said at the very start, that Mr. Lowe "is not a man who lives in a fifty thousand dollar house," and traced Lowe's personal history from his birth on a farm to a worker in a steel mill, as a structural iron worker doing "that very hazardous work" and then into his work representing labor unions. On direct examination, the defendant was asked about his house and his personal history.

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[2] 6 WIGMORE, EVIDENCE § 1888, p. 543 (3d ed. 1940); 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 60 (1954); MCCORMICK, EVIDENCE § 27 (1954).

Also, it was brought out that while Lowe held positions in various union organizations his only salary came from a job as business agent for Ironworkers, Local No. 11. When he was asked by the prosecution whether he had any other income he was very evasive and at one point, being pressed, denied further income. Then the cross examiner pressed certain specific instances on him and he admitted the receipt of the income items brought to his attention.

There are two equally conclusive answers to an objection to the examination along this line. One is that the defense itself had opened up the subject. It not only presented Lowe in argument as a humble citizen and minimized his income, but also expressly brought out the fact that while he owned a two and a half story house he lived in only one floor and rented out the rest. The prosecution met this by showing income not only from his salary but "commissions," dividends from stock and profits from stock transactions. When a party opens up a subject, even though it may not be strictly relevant to the case, he cannot complain on appeal if the other side gives him a Rowland for his Oliver.[3]

All of this was brought out on cross examination and was within the discretion which the trial judge has under the federal rule.[4]

The second reason why there was no error in the exploration of this subject is that it was cross examination. When a defendant takes the stand in a criminal case he is subject to cross examination as any other witness is. No authority needs to be cited for the proposition that one of

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[3] 1 WIGMORE, EVIDENCE § 15 (3d ed. 1940); Bradley *v.* Adams Express Co., 89 F. 2d 641 (6th Cir. 1937), *cert. denied*, 302 U. S. 698 (Oct. 11, 1937); Stentor Electric Mfg. Co. *v.* Klaxon Co., 115 F. 2d 268, 274 (3d Cir. 1940), *rev'd on other grds.*, 313 U. S. 487 (1941); United States *v.* Regents of New Mexico School of Mines, 185 F. 2d 389 (10th Cir. 1950).

[4] 6 WIGMORE, EVIDENCE § 1890 (3d ed. 1940); MCCORMICK, EVIDENCE § 24 (1954).

the purpose of cross examination is to test the credibility of the witness and, subject to the judge's control, that cross examination may go rather far. The scope of direct examination poses no limitation in this respect.[5] Here the cross examination was very material in testing the credibility of the defendant. See *United States* v. *Pagano*, 224 F. 2d 682, 685 (2d Cir. 1955), *cert. denied*, 350 U. S. 884 (Nov. 7, 1955).

What has been said already takes care of the appellant's objections to the admission into evidence of his income tax returns for the years 1951 and 1952. The defendant as a witness had been questioned about items in the returns. They had been in the hands of the prosecutor and also in the hands of the defendant to examine them on the stand and answer questions concerning certain items. The admision of the documents into evidence really gave no more information to the jury than it had already received from the oral examination of the defendant as a witness. The suggestion now made that their introduction suggested that the defendant had committed other crimes is fanciful. We quite recognize the rule that when a witness is cross examined on a collateral matter introduced for impeachment purposes the answer the witness gives ordinarily ends introduction of testimony on that point.[6] But here the introduction of the returns did not contradict the witness for he had admitted in his oral examination all the point that the returns showed.

The next problem raised by the appellant presents a question of law. He complains of the original instructions by the court and certain supplemental instructions given because these instructions did not leave to the jury the determination of whether the alleged conduct by the defendant

[5] 6 WIGMORE, EVIDENCE § 1891 (3d ed. 1940); 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 62 (1954); MCCORMICK, EVIDENCE § 22 (1954).

[6] United States v. Klass, 166 F. 2d 373, 376 (3d Cir. 1948).

affected commerce or the movement of any article in commerce. There was testimony in the case concerning the part which this piece of pipe line played in a gas distribution system which had its origin in Texas. There was testimony to the effect that this particular piece of line was connected to a meter which was part of the main line from the source of supply. The trial judge mentioned these statements to the jury and said "if believed by you beyond a reasonable doubt [they] satisfy the necessary federal jurisdictional element of interstate commerce under the law under which this indictment is drawn." In this instruction the judge was following *Hulahan* v. *United States*, 214 F. 2d 441, 445 (8th Cir. 1954), *cert. denied*, 348 U. S. 856 (Oct. 18, 1954), as closely as though he had had the report on the desk before him when he charged the jury. We have no doubt that he was right. The position taken in the *Hulahan* case is strengthened by the decision of the Second Circuit in *United States* v. *Varlack*, 225 F. 2d 665, 670 (1955).

It appears in the testimony that the appeal is from the second trial of this case and that the first trial resulted in disagreement among the jury. The appellant's last complaint has to do with questions concerning that trial. The defendant was asked whether in the former trial he called as a witness a man named William H. Payne. When a negative answer was given he was asked why. His answer to that was that the question was one for his lawyer. In the summation the prosecutor commented on the failure to call Payne in the first trial.

This is really not a very important point. The rule is well known that as a general proposition when one fails to call a witness who might have something relevant to say about his case an unfavorable inference can be urged against the one who fails to call him.[7] The idea is that if

[7] United States v. Walker Co., 152 F. 2d 612 (3d Cir. 1945).

one does not call a person who knows something about the matter it is because he is afraid that what the possible witness will say is something that will not help his case.

Payne had died before the second trial occurred. He was in court during the first trial but neither side called him. Payne was married to a niece of the defendant Lowe. She was his "favorite niece" and Lowe had testified that he had advanced $15,000 to Payne to get him into the lumber business. It was through the lumber company with which Payne was connected that the alleged extortion money was paid.

We think it inferable that neither side called Payne at the first trial because they could not depend upon what he might say. In any event, we think the question which brought out the fact that Payne was not called and Lowe's lawyer would have to be asked for the reason was not an important element in this trial and we cannot conceive how it could possibly be a ground for reversal.

The trial was a fair one. Counsel on each side knew his business. The case was submitted to the jury under instructions so explicit that its members could not fail to understand them. The issues which the jury faced were issues of fact where a decision had to be made between the categorical assertions on one side and equally categorical denials on the other. Fact conclusions were resolved in favor of the prosecution.

The judgment will be affirmed.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 10 |


## CITATIONS


Cases:

| | |
|---|---|
| *Bilokumsky* v. *Tod*, 263 U. S. 149 | 10 |
| *De Witt* v. *Skinner*, 232 Fed. 443 | 7 |
| *Gideon* v. *United States*, 52 F. 2d 427 | 7 |
| *Goldman Theatres, William* v. *Loews, Inc.*, 150 F. 2d 738, certiorari denied, 334 U. S. 811 | 10 |
| *Hung You Hong* v. *United States*, 68 F. 2d 67 | 10 |
| *Interstate Circuit* v. *United States*, 306 U. S. 208 | 9 |
| *Marino* v. *United States*, C. A. 2, pending on a petition for certiorari, No. 213 | 7 |
| *Pullman Co.* v. *Hall*, 55 F. 2d 139 | 7 |
| *Salerno* v. *United States*, 61 F. 2d 419 | 7 |
| *Simon* v. *United States*, 123 F. 2d 80, certiorari denied, 314 U. S. 694 | 7 |
| *United States* v. *Pagano*, 224 F. 2d. 682, certiorari denied, 350 U. S. 884 | 7 |
| *United States* v. *Walker Co.*, 152 F. 2d 612 | 9 |
| *Vajtauer, United States ex rel.* v. *Commissioner*, 273 U. S. 103 | 10 |

Miscellaneous:

| | |
|---|---|
| 2 Wigmore, *Evidence*, § 277 et seq. (3d ed., 1940) | 10 |
| 3 Wigmore, *Evidence*, § 1006 (3d ed., 1940) | 7 |

# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 245

JAMES LOWE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. 11–16; R. 274a–279a) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956 (R. 280a). The petition for a writ of certiorari was filed on July 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in admitting evidence elicited on cross-examina-

tion of petitioner regarding his income when the subject of petitioner's financial standing had been introduced by petitioner himself.

2. Whether the trial court committed prejudicial error in permitting cross-examination of petitioner as to his failure to call a person as his witness at an earlier trial of the same cause and in permitting comment thereon in the prosecutor's summation.

## STATEMENT

Counts I and II of a three-count indictment (R. 1a) returned in March 1955 in the District Court for the District of New Jersey charged petitioner with obstructing, delaying, and affecting interstate commerce by attempted extortion and extortion in violation of 18 U. S. C. 1951 (R. 5a–9a). These counts charged that in November 1952 he demanded $20,000, and from December 1952 through May 1953 actually received about $12,000, from one C. Hubert Gragg, a pipeline contractor, to insure that construction would not be hampered by labor difficulties. Upon conviction, petitioner was sentenced to two years on Count I and three years and a fine of $10,000 on Count II, the imprisonment sentences to run concurrently (R. 3a). The Court of Appeals unanimously affirmed (Pet. 11–16).

Count III charged one William Payne, an employee and stockholder of a lumber company, with aiding and abetting petitioner by issuing false invoices to Gragg for fictitious sales of lumber

totaling about $12,000 (R. 8a–9a). Payne died prior to trial (R. 1a).

Petitioner had been previously indicted for the same offense (Pet. 2; R. 59a). The trial of that indictment resulted in a jury disagreement. Payne was not indicted in the prior case.

The proceedings, insofar as they are relevant to issues raised in the petition for certiorari, may be summarized as follows:

1. During the course of the instant trial, petitioner's counsel said in his opening statement that the petitioner "is not a man who lives in a fifty, a hundred thousand dollar house", but a laborer who rose from the ranks to become a union representative (R. 1b). On direct examination, it was brought out that petitioner lived on the first floor of a "two-and-a-half-family house", the other floors of which were "rented out" (R. 163a), and that in November 1952 he received no compensation as an officer of two labor organizations but did receive a salary as business agent of his local union (R. 165a). Immediately following this line of inquiry, petitioner was questioned concerning his work and status as a laborer prior to becoming a union official (R. 165a–166a).

On cross-examination, petitioner was questioned further about his income in 1951 and 1952 (R. 188a–197a). When he was asked if he received commissions amounting to $29,000 from a contractor in those years, petitioner at first denied receiving that large a sum (R. 189a),

but subsequently, after being confronted with his income tax returns for those years (R. 195a), admitted that "commissions" of about $29,000 reported in his return for 1951 represented moneys he received from a "contractor here in Newark" (R. 196a, 263a). He failed to recall any income in 1952 other than his salary, "fees" from a bank, and commissions (R. 188a–189a), but later, upon interrogation with his return for 1952 before him, he admitted that he bought approximately $110,000, and sold about $114,000, worth of stock and received certain dividends (R. 191a–193a, 265a). Objection to this line of questioning was made on the ground of immateriality (R. 191a). The tax returns (R. 263a, 264a), reflecting the income about which petitioner was questioned on cross-examination, were admitted in evidence over petitioner's objection "on the ground that they were not evidential with anything at issue here and that they are improperly introduced, contrary to law" because they were confidential documents (R. 190a, 194a, 223a).

2. Evidence was introduced at the trial that $30,000 was demanded of Gragg to assure him "of a smooth running job" (R. 18a, 53a). The sum of $20,000 was ultimately agreed upon (R. 18a). Gragg testified that petitioner proposed to him that invoices be issued for lumber that would not be delivered (R. 21a, 22a). William Payne, who was married to petitioner's niece (R. 168a, 205a), was a stockholder and employee of the Empire

Lumber Company. Petitioner had loaned Payne $15,000 to get him started in that concern (R. 168a, 20(a). Petitioner introduced Gragg to Payne and it was agreed among them that false invoices would be issued by Empire to cover up the payment of the extortion money (R. 21a). Invoices were issued by Empire in the approximate amount of $12,000 and that amount was paid, but no lumber was delivered (R. 22a–25a). Petitioner denied the "fictitious invoices" transaction and the receipt of the money (R. 186a).

It was brought out on cross-examination of petitioner that he had not called Payne to testify on his behalf at the prior trial. When asked why Payne had not been called, petitioner replied, "My counsel could answer that one". Defense objections concerning questions relating to Payne's non-appearance were made on the grounds of immateriality (R. 207a–208a).

In his summation, the prosecutor commented on petitioner's failure to call Payne at the prior trial when he was available (R. 226a–227a).

## ARGUMENT

1. Petitioner contends (Pet. 5–7) that the prosecutor's cross-examination concerning commissions and other income petitioner received in 1951 and 1952, particularly the $29,000 commission, was inadmissible and prejudicial because it "suggested that he had extorted or otherwise improperly obtained from a contractor a large

sum of money on another occasion" (Pet. 5). In this connection, he invokes the familiar rule that evidence of other similar offenses is generally not admissible.

The contention is afterthought; there was no objection to the cross-examination on that ground at the trial (see p. 4, *supra*). In any event, as the Court of Appeals held, the cross-examination was proper because petitioner had himself opened the subject of his financial standing and because it was fairly calculated to test petitioner's credibility as a witness in his own defense.

Contrary to petitioner's assertion (Pet. 5), petitioner's financial condition was adverted to by his counsel in his opening statement and during the course of petitioner's direct examination (*supra*, pp. 3–4). The obvious purpose of such an exposition was to depict petitioner as a man of limited means whose scale of living was not commensurate with that of one who had extorted a large sum of money. Quite properly, the prosecution countered by eliciting on cross-examination information showing additional income. Dealing with an analogous situation, the Second Circuit stated:

> * * * the prosecutor could hardly be expected to refrain from attempting on cross-examination and on summation to destroy this picture of appellant as a steady family man with the income of a bricklayer * * *. This was not for the purpose of disclosing mere immorality; it served

to demolish the claim appellant had voluntarily asserted on his direct examination. [*United States* v. *Pagano*, 224 F. 2d 682, 686, certiorari denied, 350 U. S. 884. Cf. *Marino* v. *United States* (C. A. 2), pending on petition for certiorari, No. 213.]

And even if the challenged testimony were considered as not being directly related to the direct examination, it was within the discretionary authority of the trial court to admit it, for "The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject-matter inquired about." *De Witt* v. *Skinner*, 232 Fed. 443, 445 (C. A. 8); see also *Salerno* v. *United States*, 61 F. 2d 419, 424 (C. A. 8).

Moreover, as the court below pointed out (Pet. 14), one of the purposes of cross-examination is to test the credibility of the witness. A defendant may be cross-examined even on collateral points to show contradiction or lack of truthfulness. *Simon* v. *United States*, 123 F. 2d 80, 85 (C. A. 4), certiorari denied, 314 U. S. 694; *Pullman Co.* v. *Hall*, 55 F. 2d 139, 141 (C. A. 4); 3 Wigmore, *Evidence*, § 1006 (3d ed., 1940). In this connection, petitioner's reliance (Pet. 7) upon *Gideon* v. *United States*, 52 F. 2d 427, 430 (C. A. 8), as a conflicting decision is misplaced. In *Gideon*, it was held that cross-examination under the guise of testing the credibility of a defendant is not allowable as to matters not touched

upon in direct examination or not pertinent to the charge. The short answer is that, in the instant case, petitioner himself considered his financial condition sufficiently material so that he injected the issue into the case as a matter of defense strategy.[1]

2. Petitioner also contends (Pet. 7–9) that the trial court committed prejudicial error in per-

[1] Petitioner's subsidiary complaints (Pet. 3, 6) against the admission of his income tax returns, the prosecutor's questioning of a character witness as to whether the witness knew of the $29,000 payment to petitioner (R. 222a), and the prosecutor's reference to petitioner in his summation as "certainly one of the biggest racketeers * * * as this very evidence indicates" (R. 227), are designed to buttress his contention that the prosecutor used the evidence elicited on the cross-examination to implant in the minds of the jurors the suggestion that petitioner was guilty of earlier crimes of a like nature. The admission of the returns was proper, even if there had been an objection on that ground at the trial. The returns were in the hands of the prosecutor and petitioner during the cross-examination and they added little to it. There was no objection to the question put to the character witness, an associate of petitioner in the Essex County Building Trades Council (R. 220a–221a), and in any event this was legitimate cross-examination after the witness had testified on direct examination that petitioner's reputation for "honesty, integrity, fair dealing and telling the truth" was "very good from what I have heard" (R. 221a). The summation of the defense is not in the record and only excerpts from the prosecutor's summation are reproduced. Thus it is not possible to appraise the prosecutor's remark of which petitioner now complains in the light of the argument of defense counsel, and for this reason appellate consideration of his complaint is not open to him. Besides, the remark was a legitimate one based upon the evidence of petitioner's initial demand of $30,000, his agreement to accept $20,000, and the payment of $12,000.

mitting cross-examination of petitioner as to his failure to call Payne as his witness at the earlier trial and in permitting comment thereon in the prosecutor's summation.

The failure of a party to present an available witness who has relevant information gives rise to an inference that his testimony would be unfavorable to the party. *Interstate Circuit* v. *United States*, 306 U. S. 208, 225–226; *United States* v. *Walker Co.*, 152 F. 2d 612, 613 (C. A. 3). Petitioner recognizes this rule but argues, without supporting authority, that it is inapplicable to the party's failure to present the witness at a prior trial.

Repeated references to the first trial of "this case" were made by petitioner's counsel in his cross-examination of Gragg, the first Government witness. Gragg was questioned extensively regarding his testimony at that trial in an effort to impair his credibility (R. 47a–51a, 57a, 58a, 59a–63a, 68a). Petitioner's counsel again referred to the prior trial during his examination of defense witness Dameo (R. 137a). Thus, even before the cross-examination of petitioner, the jury were well aware that petitioner had previously been tried on the same charge, and they were aware too of Payne's part in the transactions between petitioner and Gragg. (See pp. 4–5, *supra*.)

In this context, petitioner's argument against the application of the general rule is untenable.

The theory underlying the rule is that failure to call an available witness is conduct implying consciousness of a weak case. "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 111, quoting *Bilokumsky* v. *Tod,* 263 U. S. 149, 153. See also *William Goldman Theatres* v. *Loews, Inc.,* 150 F. 2d 738, 743 (C. A. 3), certiorari denied, 334 U. S. 811; *Hung You Hong* v. *United States,* 68 F. 2d 67, 69 (C. A. 9); 2 Wigmore, *Evidence,* § 277 *et seq.* (3d ed., 1940). The fact that the conduct occurred in a prior trial of the same case is not significant. The inference that Payne's testimony would have been unfavorable to petitioner is present just as if Payne had been available and not called at the second trial.

## CONCLUSION

The decision below is correct, there is no conflict, and no other reason appears which would call for review. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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